

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 89

THE UNITED STATES OF AMERICA, APPELLANT

v.

NATIONAL LEAD COMPANY, TITAN COMPANY, INC.,
AND E. I. DU PONT DE NEMOURS AND COMPANY,
INC.

MOTION BY THE UNITED STATES FOR LEAVE TO AMEND ITS ASSIGNMENT OF ERRORS

The United States moves the Court for leave to amend its first assignment of error so that it should read as follows:

The court erred in failing to enter an injunction perpetually enjoining the defendants from enforcing the titanium patents presently owned or controlled by them.

This is a civil proceeding brought by the United States under Section 4 of the Sherman Act, in which the district court adjudged that the defendants (present appellees) had violated Section 1 of the Act and entered judgment against them. In the district court the United States

requested that the court enter a judgment requiring each appellee to make available to any applicant on a royalty-free basis, for the duration of the patents, any or all patents then owned or controlled by it relating to the manufacture or use of titanium pigments or compounds (R. 39-40, 180, 1220). The judgment which was entered did not grant this relief, but required each defendant to grant to any applicant a nonexclusive license under any or all of its existing patents or patent applications for titanium pigments or compounds, at a uniform, reasonable royalty (R. 313-314).

In the appeal taken by the United States it assigned as error, among other things (R. 330, 331):

1. The court erred in failing to require each defendant to license its existing titanium pigment patents free of royalty until the court shall have determined, on application by any defendant, that the effects of the defendants' illegal combination, as set forth in the court's findings of fact and conclusions of law, have been fully dissipated.

* * * * *

7. The court erred in failing to grant to the plaintiff the relief to which it is entitled.

By letters dated October 17, 1946, the United States advised counsel for the respective appellees that it proposed to argue under its seventh assignment of error that the district court erred in

failing to hold that the defendants' existing titanium patents are perpetually unenforceable because of the use made of them in restraining trade beyond the scope of the patent grant and in failing to enter an injunction perpetually enjoining the enforcement of such patents. Counsel were requested to advise whether they would contend that this argument is not within the scope of the Government's assignment of errors. Counsel for appellees National Lead Company and Titan Company, Inc., responded that they would not so contend and counsel for appellee E. I. du Pont de Nemours and Company, Inc., declined to give such assurance. A copy of the Solicitor General's letter of October 17, 1946, and a copy of the two replies from counsel for appellees are attached hereto and marked, respectively, Exhibit A, Exhibit B, and Exhibit C. We are advised by the Clerk that the case will not be reached for oral argument until the week of February 3rd.

The proposed amendment of petitioners' assignment of error cannot prejudice appellee du Pont since it has been given adequate advance notice of the question which the United States proposes to present to the Court and since substantially the entire record in the case is before the Court on the appeal and the omitted portions of the record are not in any respect relevant to this question. The amended assignment is within the

scope of the relief sought in the district court.
(R. 39-40, 180, 1220).

In these circumstances, it would seem to be in the interest of justice that there be appellate review of the respects in which the Government deems that the relief granted by the district court was inadequate. It would also seem desirable to remove from the field of controversy dispute as to what is or is not within the scope of the Government's original assignment of errors.

This Court has previously granted motions to amend assignments of errors. *Dayton Power and Light Co. v. Public Utilities Commission of Ohio*, 292 U. S. 299, 312; *O'Connell v. United States*, 253 U. S. 142, 144, 147.

It is submitted that, for the reasons stated, the Court should grant the Government's motion.

Respectfully submitted.

GEORGE T. WASHINGTON,
Acting Solicitor General.

NOVEMBER 1946.

EXHIBIT A

OFFICE OF THE SOLICITOR GENERAL

WASHINGTON, D. C.

OCTOBER 17, 1946.

Re: *United States v. National Lead Co., Titan Co.,
Inc., and E. I. du Pont de Nemours and Co.,
Inc., No. 89*

BETHUEL M. WEBSTER, Esq.,
Webster & Garside,

15 Broad Street, New York 5, N. Y.

DEAR MR. WEBSTER: We propose to argue under our seventh assignment of error that the district court erred in failing to hold that the defendants' existing titanium patents are perpetually unenforceable because of the use made of them in restraining trade beyond the scope of the patent grant, and in failing to enter an injunction perpetually enjoining the enforcement of such patents.

We assume that you will not take the position that this argument is not within the scope of the errors which we have assigned. If you intend to make this point would you be good enough to advise us promptly of that fact.

Sincerely yours;

J. HOWARD McGRATH,
Solicitor General.

EXHIBIT A

OFFICE OF THE SOLICITOR GENERAL

WASHINGTON, D. C.

OCTOBER 17, 1946.

**Re: *United States v. National Lead Co., Titan Co.,
Inc., and E. I. du Pont de Nemours and Co.,
Inc., No. 89***

**WM. DWIGHT WHITNEY, Esq.,
Cravath, Swaine & Moore,
*15 Broad Street, New York 5, N. Y.***

DEAR MR. WHITNEY: We propose to argue under our seventh assignment of error that the district court erred in failing to hold that the defendants' existing titanium patents are perpetually unenforceable because of the use made of them in restraining trade beyond the scope of the patent grant, and in failing to enter an injunction perpetually enjoining the enforcement of such patents.

We assume that you will not take the position that this argument is not within the scope of the errors which we have assigned. If you intend to make this point would you be good enough to advise us promptly of that fact.

Sincerely yours,

J. HOWARD McGRATH,
Solicitor General.

EXHIBIT B

WEBSTER & GARSIDE

ATTORNEYS AND COUNSELLORS AT LAW

15 Broad Street

NEW YORK 5

OCTOBER 21, 1946.

**Re: *United States v. National Lead
Company et al., No. 89***

J. HOWARD McGRATH, Esq.,

Solicitor General, Washington, D. C.

DEAR MR. McGRATH: Answering your letter of October 17, you are correct in assuming that we shall not take the position that the argument mentioned is not within the scope of the errors assigned by the Government.

Sincerely yours,

BETHUEL M. WEBSTER.

EXHIBIT C

CRAVATH, SWAINE & MOORE

15 Broad Street

NEW YORK 5

OCTOBER 22, 1946.

Re: U. S. v. National Lead Co., Nos. 89-91

DEAR MR. SOLICITOR GENERAL: I have your letter of October 17. It does, indeed, appear that the proposed modification of Assignment of Error represents a serious modification of the Government's Assignment of Error No. 1, and I regret that I am not, therefore, in a position to consent to it on behalf of my client.

Yours very truly,

WM. DWIGHT WHITNEY.

HON. J. HOWARD McGRATH,

Solicitor General,

Department of Justice, Washington, D. C.

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